Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1995

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS/CROSS-RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. IT CANNOT BE SAID THAT LOSS OF SOCIETY IS NOT "DAMAGE" 1

A. Extrinsic evidence associated with the Warsaw Convention is inconclusive, and should not be relied on 1

B. Subsequent practice of the parties to the Convention is also inconclusive 4

II. ARTICLE 24 OF THE WARSAW CONVENTION DOES NOT ADDRESS RECOVERABLE DAMAGES FOR WRONGFUL DEATH 5

III. INTERNATIONAL AVIATION ACCIDENTS UNDER THE WARSAW CONVENTION CANNOT BE EQUATED WITH MARITIME ACCIDENTS UNDER DOHSA 7

A. The United States Congress has expressed no opinion on the elements of recoverable damages under Article 17 7

B. Freed from the shackles of DOHSA and the Jones Act, this Court should permit recovery of loss of society damages under the Warsaw Convention 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

I. Cases

American Export Lines, Inc. v. Alvez, 447 U.S. 274 (1980) 7, 10

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 7, 9

Preston v. Hunting Air Transport Ltd., [1956] 1 Q.B. 454 (Eng.) 4, 5

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1979) 10

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 3

United States v. Stuart, 489 U.S. 353 (1989) (Scalia, J., concurring) 3

II. Treaties, Statutes and Rules

4 Halsbury's Statutes (4th ed. 1985) (Eng.) 5

1961 Carriage by Air Act, 9 & 10 Eliz. 2, ch. 27 (Eng.) 4

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. §1502 ("Warsaw Convention") ..... *passim*

Fatal Accidents Act, 1976, ch. 30 (Eng.) 4

III. Other Authorities

Black's Law Dictionary (5th ed. 1979) 6

Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66 (1981) 5

TABLE OF AUTHORITIES – Continued

Page

Mankiewicz, *The Liability Regime of the International Air Carrier* (1981) 6

Sand, *Limitation of Liability and Passengers' Accident Compensation Under the Warsaw Convention,* 11 Am. J. of Comp. Law 21 (1962) 9

Second International Conference on Private Aeronautical Law, (Horner *et al.* trans 1975) 3

ARGUMENT

I. IT CANNOT BE SAID THAT LOSS OF SOCIETY IS NOT "DAMAGE."

The Warsaw Convention contains a simple directive to the courts of the United States: an air carrier *"shall be liable* for damage sustained in the event of the death . . . of a passenger." 49 Stat. 3018 (emphasis added). This imperative cannot be disregarded by any court, because the Warsaw Convention is the supreme law of the land. Thus, the *only* way to deny recovery to Marjorie Zicherman and Muriel Mahalek in this case is to conclude that the loss of Muriel Kole's society was not "damage" of any sort.

The conclusion that loss of society is not "damage" is belied by the dictionary definitions cited in the Petitioner's principal brief (at page 8), which KAL has elected not to address. It is also belied by common experience. The loss of a sister or daughter is far more devastating than the loss of any sum of money, but KAL's analysis forces the backwards conclusion that the latter event is damage, while the former is not.

A. Extrinsic evidence associated with the Warsaw Convention is inconclusive, and should not be relied on.

To support its position that Article 17 defers to local law for the elements of recoverable damages, KAL primarily relies on extrinsic evidence associated with the Warsaw Convention, particularly on remarks made by Henry de Vos in 1928. These remarks suggest that the

committee responsible for drafting the Warsaw Convention (CITEJA) could not agree on what damages should be compensable under Article 17 (KAL brief at 19). Mr. de Vos's remarks preceded the 1929 conference in Warsaw, where the Convention was actually debated and voted upon. The minutes of that 1929 conference contain little discussion of Article 17, and it is therefore impossible to determine what the delegates really thought about the meaning of the term "dommage."

In all likelihood, the various delegates to the 1929 Warsaw conference had a variety of opinions on the meaning of Article 17. Because the word "dommage" so clearly included non-pecuniary damages under French law (see Petitioner's Brief at 9-10), many of them may have assumed that "dommage" included, at a minimum, damages for loss of society. Others may have agreed with Mr. de Vos that the question should be left to local law. Sixty-five years after the fact, it is impossible to ascribe a single "intent" to a diverse group of delegates from many different nations.

At one point during the 1929 conference, the subject of a carrier's liability for the actions of its servants was debated. Georges Ripert, one of the French delegates, expressed the following general concern:

> We will do our best to find the formula which will be satisfactory, but it is agreed that, from this point on, we are absolutely opposed to a formula that would lead to the application of national law. It's the *first time* that application of national law is required and if it were allowed for this question, it would be required for

> others. From our point of view, one would thus arrive in destroying the convention, if one establishes recourse to national law upon each article.

Second International Conference on Private Aeronautical Law, at 66 (Horner *et al.* trans. 1975) (emphasis added). This concern was echoed by other delegates in a variety of contexts. *See, e.g., id.* at 35 (Alfred Dennis, Great Britain) and 64 (Amedeo Giannini, Italy). Thus, extrinsic evidence associated with the Warsaw Convention is inconclusive, and can usually be cited to support either side of a given problem of interpretation.

It is precisely because the intent of the Convention's drafters is so elusive that this Court should rely on the ordinary meaning of the words used in writing Article 17. *See generally United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) (treaties, like statutes, should be construed by first looking to their terms); *United States v. Stuart*, 489 U.S. 353, 371-72 (1989) (Scalia, J., concurring) (extrinsic evidence cannot be used to contradict the plain meaning of a treaty provision). If a word as simple and as commonly used as the word "damage" requires an examination of extrinsic evidence to determine its meaning, then it is doubtful that any treaty provision could ever be applied based on its ordinary meaning.[1] "Damage" equals "loss," and therefore includes loss of society.

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[1] Contrary to KAL's assertion, the Petitioners did argue in the Second Circuit that the ordinary meaning of the term "damage" includes loss of society. Brief of the Plaintiffs/Cross-Appellants in Nos. 93-7490, 93-7546 (2d Cir. 1993) at page 19.

B. Subsequent practice of the parties to the Convention is also inconclusive.

At least one foreign court has ruled that the plain meaning of the word "damage" in Article 17 includes non-pecuniary losses. *Preston v. Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454. The English High Court of Justice, Queen's Bench Division, held in *Preston* that Article 17 "does not refer particularly to financial loss, it refers to damage . . . " *Id.* at 461. This includes

> . . . loss which [the minor plaintiffs] inevitably must have sustained beyond the actual financial loss by the fact that they lost their mother as young children . . . As I interpret the words of article 17 it does seem to me that this is an item of damage for which the plaintiffs are entitled to be compensated.

Id. Thus, *Preston* did not really apply English law, as KAL asserts in its brief (KAL brief at 21); rather, the English court relied on the plain meaning of the word "damage" to reach its result.

The status of Article 17 in England has become somewhat less clear since *Preston* was decided. The 1961 Carriage by Air Act, 9 & 10 Eliz. 2, ch. 27, §3, brings Warsaw Convention cases within the ambit of the Fatal Accidents Act.[2] The Fatal Accidents Act provides only for recovery of pecuniary damages, plus a fixed amount for the bereavement of certain surviving relatives. However, the Warsaw Convention itself is set out as the First Schedule

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[2] The original 1846 Fatal Accidents Act has now been replaced by a new version enacted in 1976. Fatal Accidents Act, 1976, ch. 30 (Eng.).

to the Carriage by Air Act, and a Note following Article 17 cites the *Preston* case for the proposition that Article 17 "is not limited purely to financial loss." 4 Halsbury's Statutes at 33 (4th ed. 1985).

Apart from England, it is true that some other countries have enacted legislation defining the types of damages recoverable under Article 17.[3] This may be an indication that the legislative bodies of these countries viewed Article 17 as silent on the question, although the statutes they enacted might just as easily be viewed as a codification of what those legislators felt was the article's ordinary meaning. All other countries, most notably the United States, have chosen not to enact any enabling legislation, leaving courts to interpret the plain meaning of the phrase "damage sustained." On balance, then, the subsequent practice of the parties to the Convention is just as inconclusive as the drafting history that preceded its adoption. The ordinary meaning of "damage sustained" is the only reliable guide to interpreting Article 17.

II. ARTICLE 24 OF THE WARSAW CONVENTION DOES NOT ADDRESS RECOVERABLE DAMAGES FOR WRONGFUL DEATH

When luggage or goods are damaged on an international flight, jurists from around the world can all agree

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[3] Canada is one such nation. Interestingly, however, in some provinces loss of society is recoverable under Article 17. Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66, 71 (1981).

that the owner of the damaged personal property is the proper party to file a lawsuit. Any recovery from the air carrier would then obviously go to compensate that party. When a passenger dies, however, there is no uniform international jurisprudence that would specify the appropriate persons to bring suit, or the proper way to distribute any recovery that the named plaintiff might be awarded. *See generally* Mankiewicz, *The Liability Regime of the International Air Carrier* 161 (1981).

Article 24 of the Warsaw Convention, by its own terms, addresses these procedural difficulties encountered when a passenger dies. The Article states that the conditions and limits of the Convention apply to accidents resulting in death, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020. The modifier "respective" is critical: it means "relating to particular persons or things, *each to each.*" *Black's Law Dictionary* 1179 (5th ed. 1979) (emphasis added). It has the same import as the Latin term *inter se*, which is "used to distinguish rights or duties *between* two or more parties from their rights or duties to others." *Id.* at 735 (emphasis added).

By referring to "respective" rights, Article 24 thus applies only to the division of a recovery between a decedent's survivors and beneficiaries. The Article does *not* say that the term "damage" in Article 17 has no meaning, and it does not say that the elements of recoverable damages are left to local law. It just says that, once those damages are adjudicated, their distribution will be left to the law of the forum.

III. INTERNATIONAL AVIATION ACCIDENTS UNDER THE WARSAW CONVENTION CANNOT BE EQUATED WITH MARITIME ACCIDENTS UNDER DOHSA

If this Court decides that the elements of recoverable damages under Article 17 must be determined by reference to the law of the United States, it must take into account the unique structure and purpose of the Warsaw Convention. KAL's analysis ignores the Convention's unique character, and thereby works a great injustice to passengers on international flights.

A. The United States Congress has expressed no opinion on the elements of recoverable damages under Article 17.

In recent years, this Court has relied heavily on Congressional enactments to shape maritime jurisprudence. The rationale behind this approach is understandable: where Congress has spoken on a particular subject, the courts should listen carefully. Even if a statute is not directly applicable, courts should follow it closely if it seems to encompass the same subject matter as the case under consideration. *See e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990).

For general maritime law wrongful death cases, DOHSA and the Jones Act may indeed provide Congressional guidance on the elements of recoverable damage.[4] There is no significant difference, for example, between

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[4] This proposition is not free from all doubt. *See American Export Lines, Inc. v. Alvez*, 447 U.S. 274, 283 (1980).

the stabbing death of a sailor on the high seas (covered by DOHSA), the death of a sailor due to negligence at any location (covered by the Jones Act), and the stabbing death of the sailor in *Miles* that occurred while his vessel was in port (not directly covered by any statute). It makes some sense to borrow a statute to shape general maritime law in a case like *Miles*.

In a case governed by the Warsaw Convention, however, the analysis used in *Miles* breaks down. The Warsaw Convention has a $75,000.00 cap on damages that is unknown to any maritime statute or any general maritime jurisprudence. This damages cap was unheard of in 1920 when DOHSA and the Jones Act were debated and enacted, and it is therefore impossible to say that Congress has "directly spoken" on the subject of Muriel Kole's death.

In fact, Congress might well be shocked to learn that its restrictive pecuniary loss statutes were being borrowed in a Warsaw Convention case, where passengers generally have an extremely limited recovery to begin with. As noted in the Amici brief of Philomena Dooley *et al.* (at pages 15-16), at least one Congressman, Senator Robert Kennedy, expressed grave concern that the Warsaw Convention unduly restricted the recovery available to international air travelers. Borrowing DOHSA and the Jones Act is therefore a mistake in cases that are subject to the Warsaw Convention's unique system of liability limits, because it is impossible to know whether or not Congress would approve.

It must be remembered that, in adopting the Warsaw Convention, Congress also adopted the Convention's

goal of uniform rules to govern international air transport. Borrowing DOHSA's damages rules would defeat this Congressional purpose, because DOHSA says nothing about deaths that occur on land, and a different rule would have to be fashioned to cover aviation accidents that do not occur on the high seas. Indeed, although KAL correctly points out that most international air travel occurs over water, it overlooks the fact that most international air *accidents* occur over land. Sand, *Limitation of Liability and Passengers' Accident Compensation Under the Warsaw Convention*, 11 Am. J. of Comp. Law 21, 25 (1962) (of 40 American cases dealing with passenger death or injury in international air carriage, only 6 occurred on the high seas).

In its Amicus brief, Pan American World Airways suggests that DOHSA should be borrowed for *all* Warsaw Convention accidents, whether they occur over land or water (Pan American brief at page 28). Although this approach might produce some uniformity, it stretches the rationale of *Miles* far past the breaking point. Pan Am takes the following logic from *Miles:*

> 1. A Congressional enactment that applies to the negligence death of a sailor should properly be borrowed to cover a general maritime death action brought by a sailor on unseaworthiness grounds;

and transforms it into the following:

> 2. A statute enacted in 1920 to govern deaths that occur aboard ships on the high seas should be borrowed to govern the death of airline passengers who are killed when their airplane crashes into land.

Rather than following such strained reasoning, this Court should recognize that Congress has not directly spoken on the subject of international aviation accidents. It would be a legal fiction to suggest that DOHSA "speaks" to the death of Muriel Kole.

B. Freed from the shackles of DOHSA and the Jones Act, this Court should permit recovery of loss of society damages under the Warsaw Convention.

Because DOHSA and the Jones Act are incompatible with the Warsaw Convention, this Court is writing on a clean slate. Loss of society can and should be compensable under Article 17 of the Warsaw Convention. There are three reasons for this.

First, *stare decisis*. This Court has already observed that federal damages law is not stagnant, but must evolve as public policies change (so long as it is not constrained by Congressional enactments). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1979). In *Gaudet* and in *Alvez*, loss of society was recognized as a feature of federal damage law where DOHSA and the Jones Act have no role to play.

Second, deterrence. KAL takes the position that compensatory damages have no deterrent value (KAL brief at page 30, n. 34). This is untrue. A party that is potentially liable for compensatory damages will always try to be careful and avoid any such liability. The higher the potential exposure, the greater the incentive to be careful.

In this case, of course, Muriel Kole was killed not just because KAL was careless, but because the airline committed willful misconduct. To limit KAL's liability to pecuniary damages would greatly impair the deterrent value of the Warsaw Convention, which lifts the damages cap in cases of willful misconduct.

Third, uniformity. By fashioning a unique body of damage law applicable to all Warsaw Convention cases brought in United States courts (whether the accident occurred over land or water), this Court will promote the Warsaw Convention's goal of uniformity.

Finally, this Court should reject the Second Circuit's decision to limit loss of society damages to financially dependent relatives. A surviving family member who works hard to earn a living should not have fewer rights than one who does not. Nothing in the language, history, or purpose of the Warsaw Convention supports such a limitation on damages.

CONCLUSION

For the reasons discussed in this brief and in the Petitioners' principal brief, the judgment of the Court of Appeals on the issue of loss of society damages should be vacated, and the judgment of the District Court awarding

loss of society damages to Zicherman and to Mahalek should be affirmed.

Respectfully submitted,

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